

# **DRAFT**

## **468-600 Transportation Innovative Partnership Program**

### **468-600-010. Intent.**

The Transportation Innovative Partnership Act was created to encourage the innovative delivery and funding of important transportation-related projects and services by leveraging resources more readily available in the private sector.

The Legislature has articulated the policy goals and objectives of the Act, found in 47.29 RCW. These rules are intended to prescribe the processes that will be used to implement a successful Transportation Innovative Partnership Program in the state of Washington.

### **468-600-015. Definitions.**

As used in these rules:

- (1) "Commission" means the Washington State Transportation Commission;
- (2) "Competing Proposal" means a written submission to the Department that a Proposer submits in response to a notice issued by the Department under WAC 468-600-320;
- (3) "Department" means the Washington State Department of Transportation;
- (4) "Eligible project" means (a) Transportation projects, whether capital or operating, where the state's primary purpose for the project is to facilitate the safe transport of people or goods via any mode of travel. However, this does not include projects that are primarily for recreational purposes, such as parks, hiking trails, off-road vehicle trails, etc.; and (b) Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently with an eligible transportation project and that are capable of providing revenues to support financing of an eligible transportation project, or that are public projects that advance public purposes unrelated to transportation.
- (5) "Eligible public works project" means only a project that meets the criteria of either RCW [47.29.060](#) (3) or (4).
- (6) "Governor" means the Governor of the State of Washington;
- (7) "Key Persons" means individuals or personnel employed by or affiliated with a proposer or team of proposers, and who, because of that person's responsibilities and participation in a proposed project, the Department has formally designated as key to the proposer's ability to successfully develop or deliver the project.
- (8) "Major Partner" means, with respect to a limited liability company or joint venture, each firm, business organization or person that has an ownership interest therein in excess of 5%, unless the Department has provided an alternate definition that applies only to a specific project or series of projects;
- (9) "Major Subcontractor" means any subcontractor designated in the proposal to perform 10% or more of the scope of work for a proposed Project, unless the Department has provided an alternate definition that applies only to a specific project or series of projects;
- (10) "Private sector partner" and "private partner" means a person, entity or organization that is not the federal government, a state, or a political subdivision of the state and that proposes to enter into an agreement with the State to participate in any or all portions of the design, development, construction, improvement, expansion, extension, delivery, operation, maintenance or financing of a project eligible under the Act;

- (11) "Proposal" means a written submission to the Department satisfying the requirements of WAC 468-600-105, WAC 468-600-240 or WAC 468-600-250;
- (12) "Proposer" means a person, business entity, a consortium of business entities or a public sector entity that submit a proposal for review and evaluation under these rules, whether the proposal was solicited or unsolicited by the Department;
- (13) "Public facility" means a building, structure, vehicle, vessel or the like where ownership is retained by the public sector and where the facility is available for use by the general public. This does not include any facilities that are owned by the private sector.
- (14) "Public funds" means all moneys derived from a public imposition of taxes, fees, charges and tolls, including those imposed by a private entity for the privilege to use a publicly-owned facility;
- (15) "Public-Private Partnership" and "PPP" mean a non-traditional arrangement between the Department and one or more public or private entities for the implementation of an eligible project as defined in subsection (12) of this section;
- (16) "Public project" means a project that is owned by the state or any of its political subdivisions.
- (17) "Secretary" means the Secretary of the Washington State Department of Transportation;
- (18) "State" means the government of the state of Washington, including all agencies, organizations, boards, commissions, elected or appointed officials, who are empowered to act on behalf of the state of Washington.
- (19) "Transportation Innovative Partnership Act" and "Act" means the law enacted and codified in chapter 47.29 RCW, and any amendments thereto;
- (20) "Transportation Innovative Partnership Program" and "TIPP" means that portion of the Department of Transportation responsible for implementing and carrying out the duties prescribed in RCW 47.29, these rules, and under the general powers conferred upon the Department to implement the executive branch functions of state government;
- (21) "WSDOT" means the Washington State Department of Transportation.

**468-600-030. Conflict of Interest, Proposer Conduct & Appearance of Fairness**

**468-600-031. Conflict of Interest.**

- (1) No private sector partner, whether a Major Partner or a Major Subcontractor, may participate in an eligible project developed under the TIP program if the private partner, to the best of its knowledge, is aware of a conflict of interest. For purposes of these rules, a conflict of interest means that because of other activities or relationships with other persons or entities, including activities or relationships of its principal officers, its owners or its subcontractors, a firm is unable or potentially unable to render impartial assistance or advice to the state; or is unable or potentially unable to carry out its contractual obligations in an objective manner; or the private partner's ability to work in a "best for project" manner is any way affected, diminished or impeded.
- (2) By submitting a proposal, the Proposer certifies that, to the best of its knowledge, it is unaware of any information that might be pertinent in determining whether a conflict of interest exists. If the Proposer is aware of information that might be pertinent to this issue, the Proposer must provide, as an exception to the certification, a disclosure statement fully describing this information as part of its proposal.

**468-600-035. Proposer Conduct.**

(1) Proposers are prohibited from influencing or attempting to influence the evaluation of, or the decision to select a specific project proposal that has been submitted, or may be submitted under these rules, except as specifically allowed under these rules or as specifically allowed by the state in any RFP document. This includes, but is not limited to, attempts to influence officers or employees of the state or elected or appointed officials of the local, state or federal level of government.

(2) For those activities not prohibited by subsection (1) but which attempt to influence decision-making in any legislative branch, Proposers must fully disclose all lobbying activities undertaken by any of its contractors, officers, employees or agents that are subject to public disclosure under RCW 42.17 or federal law. For lobbying activities subject to RCW 42.17, copies of all required disclosure forms for the previous two years' reporting cycles must be submitted.

**468-600-038. Conflict of Interest by State Officials; Appearance of Fairness.**

(1) Any person elected, appointed or employed by the state, who has a conflict of interest or potential conflict of interest, must disclose such actual or potential conflict of interest and abstain from consideration, discussion, debate, and decision-making concerning any project proposal submitted under these rules.

(2) During the pendency of any solicitation, negotiation or selection of a proposal, no member of the Commission may engage in ex parte communications with proponents or opponents with respect to the proposal, unless that person:

(a) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and

(b) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each meeting where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of the Commission from seeking in a public meeting specific information or data from such parties relative to the decision if both the request and the results are a part of the public record.

**468-600-040. Release of Rights and Indemnification of State.**

(1) By submitting a proposal, a Proposer thereby waives and relinquishes any claim, right, or expectation to occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, rights-of-way, public property or public facility identified in the proposal as being necessary for or part of the proposed project. A Proposer may not obtain any claim, right or expectation to use any such route, corridor, rights-of-way, public property or public facility by virtue of having submitted a proposal that proposes to use it or otherwise involves or affects it.

(2) By submitting such a proposal, a Proposer thereby waives and relinquishes any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, rights-of-way, alignment, or transportation mode or configuration identified in the proposal as being involved in or related to the proposed project, and Proposer agrees to indemnify and hold the state harmless against any such claim made by any of its contractors, subcontractors, agents, employees and assigns.

(3) The waiver and release of rights in subsections (1) and (2) do not apply to a Proposer's rights in any documents, designs and other information and records that

constitute “sensitive business, commercial or financial information” as that term is defined and used in WAC 468-600-605.

**468-600-100. Solicited Proposals.**

**468-600-101. Department to Establish Programmatic Approach to Solicitation of TIP Projects.**

(1) The Department shall establish and maintain a registry of projects eligible for development under a competitive solicitation process. The projects must meet all eligibility requirements of WAC 468-600-015(12). The projects should be reasonably described, including the status of any preliminary development or construction, and any public or private funds committed for any phase of the project, whether expended, appropriated, earmarked or otherwise identified as available for use.

(2) The Department shall periodically update the information in the registry, and shall review and consider additions or deletions to the registry once each year. When considering additional projects for the registry, or removal of the projects on the registry, the Department must publish a request for information that seeks comments and suggestions from the public and private sectors.

(3) At least once every two years, the Department must develop a plan for conducting a solicitation of proposals under the TIP program. The purpose of this plan is to: (a) encourage sound programming and budgeting practices, which are the basis for submittals required under chapter 43.88 RCW; (b) ensure that the Department does not issue a request for proposals that exceeds the resources available to properly evaluate, select and enter into development agreements; (c) ensure that development of projects under the TIP program would not run contrary to any legislatively-enacted direction or express executive policies or directions; and (d) provide potential Proposers an anticipated schedule for the solicitation and development of certain projects on the registry. In selecting projects for competitive solicitation, the Department should endeavor to follow the published plan for soliciting proposals for projects on the registry. However, the Department is not required to solicit only those projects contained on the registry, nor is it required to conduct a solicitation for a predetermined number of projects each year or biennium, nor is it required to undertake projects in the exact order of consideration as published in the register.

**468-600-102. Selection of Projects for Solicitation.**

The Department may select projects for development that it believes would benefit from the formation of a public-private partnership under the TIP program, and present a draft Request for Proposals for the selected project or projects to the Commission for review and approval to proceed with a solicitation. In making its recommendation of projects for solicitation, the Department should seek those that offer the greatest potential to accelerate cost-effective delivery of the project, promote innovative approaches to delivering the project, provide a means of financing for the project that might not otherwise be readily available under a traditional project delivery process, or otherwise meet the policy goals established in RCW 47.29.040. Before approving any projects proposed for solicitation, the Commission must ensure that the projects are included in the Washington Transportation Plan or otherwise identified by the Commission as being a priority need for the state.

#### **468-600-103. Alternative Process for Soliciting Projects Authorized.**

When the Department in its sole discretion deems it appropriate to do so given the nature of the proposal, the Department may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-105 through 110 and WAC 468-600-300 through 350. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 to 47.29.270. Examples of possible alternative processes include:

(1) Issuing a Request for Qualifications, where Proposers are ranked and selected based on the qualifications of the Major Partners, Major Subcontractors and Key Persons, which would result in a pre-development agreement being entered into that authorizes the Proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350;

(2) Issuing a Request for Proposals that invites the private sector to make proposals to develop eligible projects that are contained in the Department's registry of projects under WAC 468-600-101.

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the State's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

#### **468-600-105. Issuance of Requests for Proposals.**

The Department must specify requirements for proposal content, and may identify criteria and procedures under which proposals will be evaluated and selected. If the Commission approves the projects and the RFP proposed for solicitation, the Department shall issue the RFP and publish notice as provided in WAC 468-600-106. The Department may set the deadline for responses as it sees fit to encourage full knowledge, opportunity and competition among private entities. At a minimum, the Request for Proposals for each transportation project must include the following:

##### **(1) General Information.**

(a) Notice of any pre-proposal conference as follows:

- (i) The time, date and location of any pre-proposal conference;
- (ii) Whether attendance at the conference will be mandatory or voluntary; and
- (iii) That statements made by the Department's representatives at the conference are not binding upon the state unless confirmed by written addendum.

- (b) The name and title of the person authorized and designated by the Department to receive the proposals and contact person (if different);
- (c) Instructions and information concerning submission requirements including the address of the office to which proposals must be delivered and any other special information, e.g., whether proposals may be submitted by facsimile or Electronic Data Interchange (secured email);
- (d) The time and date of closing after which the Department will not accept proposals, which time shall be not less than five calendar days after the date of the last publication of the advertisement. The interval between the date of issuance of the solicitation document and a closing should not be less than 30 calendar days unless the state finds a shorter interval is in the public's interest;

- (e) The form and submission of proposals and any information required therein;
- (f) If the agreement resulting from a solicitation will be a contract for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. section 3141 to 3148), a statement that no proposals will be considered by the state unless the proposal contains a statement by the Proposer, as part of its proposal, that Proposer agrees to be bound by and will comply with the provisions of chapter 39.12 RCW or 40 USC section 3141 to 3148;
- (g) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with RCW \_\_\_\_;
- (h) How the state will notify Proposers of Addenda and how the state will make addenda available.

**(2) Project Description.** A description of the eligible Project for which the Department is requesting proposals for a public-private partnership in such detail as the Department considers appropriate or feasible under the circumstance.

**(3) Evaluation Process:**

- (a) a statement that the Department may reject any proposal not in compliance with all prescribed procedures and requirements and other applicable laws, and that the state reserves its rights under WAC 468-600-810 through .820;
- (b) the anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any; and
- (c) Evaluation criteria that the state will use to select a proposal(s) from among those submitted in response to the Request for Proposals.

**(4). Desired contract terms.** The Department shall provide an outline or draft term sheet of those contract terms and conditions, including warranties and bonding requirements, that the Department considers necessary.

**(5) Federal funds.** If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by state law.

**468-600-110. Public Notice of Solicitation.**

**(1) Notice and Distribution Fee.** The Department shall furnish notice to a sufficient number of entities for the purpose of fostering and promoting competition. The notice shall indicate where, when, how, and for how long the solicitation document may be obtained and generally describe the work. The notice may contain any other appropriate information. The Department may charge a fee or require a deposit for the solicitation document. The Department may furnish notice using any method determined to foster and promote competition, including:

- (a) Mail notice of the availability of solicitation documents ("notice") to entities that have expressed an interest in Department procurements;
- (b) Place notice on the State of Washington's electronic procurement system; or
- (c) Place notice on the Department's and the Commission's internet web site.

**(2) Advertising.** The Department shall advertise every solicitation for proposals, unless otherwise specifically exempted from any requirement to solicit via advertisement.

- (a) Unless the Department publishes by Electronic Advertisement as permitted under subsection (ii) of this section, the Department shall publish the advertisement for proposals at least once in at least one newspaper of general circulation in the area where the Contract is to be performed, in at least one trade newspaper or publication of general statewide circulation and in as many

additional issues and publications as the Department may determine to be necessary or desirable to foster and promote competition.

(b) The Department may publish by Electronic Advertisement if:

(i) The Department has published a notice that it may publish future advertisements for proposals by Electronic Advertisement. The Department shall publish such notice weekly, for no less than four consecutive weeks, in at least one newspaper of general circulation in the area where the regional office of the Department is located and in as many additional issues and publications as the Department may determine to be necessary or desirable to provide notice to potential Proposers. The Department notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Department will publish future Electronic Advertisements or alternatively, to the Web location where the Department will publish information on accessing the Electronic Advertisement via a telnet application;

(ii) The Department posts in its business office a notice that the Department will publish advertisements for proposals by Electronic Advertisement. The notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Department publishes Electronic Advertisements or alternatively, to the Web location where the Department publishes information on accessing the Electronic Advertisement via telnet; and

(iii) The Office of Financial Management determines Electronic Advertisement is less expensive than publishing by newspaper under subsection (7)(b)(i) of this section.

(c) All advertisements for proposals shall set forth:

(i) The scheduled closing, that shall not be less than five days after the date of the last publication of the advertisement;

(ii) The date that entities must file applications for prequalification if prequalification is a requirement and the class or classes of work for which entities must be prequalified;

(iii) The nature of the work to be performed or the goods to be purchased;

(iv) The office where any documents related to the solicitation may be reviewed;

(v) The name, title and address of the Department employee authorized to receive proposals; and

(vi) If applicable, that the contract is for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. sections 3141 to 3148).

**(3) Posting Advertisement for Proposals.** The Department shall post a copy of each advertisement for proposals at the principal business office of the Department. A Proposer may obtain a copy of the advertisement for proposals upon request from the Transportation Innovative Partnership Program office, or on the Internet at [www.wsdot.wa.gov](http://www.wsdot.wa.gov).

**(4) Disadvantaged Business Enterprises.** The Department shall provide timely notice of all solicitations to the Office of Disadvantaged Business Enterprises.

**468-600-200. Unsolicited Proposals.**

**468-600-201. Authority for the State to Accept Unsolicited Proposals; Moratorium.**

Pursuant to RCW 47.29.170, the Commission may not accept or consider any unsolicited proposals before January 1, 2007.

**468-600-210. Projects Eligible for Unsolicited Proposals.**

Projects that are the subject of an unsolicited proposal must meet the following minimum criteria:

- (1) The project must meet the definition of an “eligible project” under WAC 468-600-015(12);
- (2) The project must not be listed in the registry of projects intended for a competitive solicitation, under WAC 468-600-101;
- (3) The project must be included in the Washington Transportation Plan or otherwise identified by the Commission as being a priority need of the State.

**468-600-215. Department’s Management of Unsolicited Proposals.**

(1) The Department may, at any time, select any class, category or description of proposal or an eligible Project, including any individual proposal or Project, for the purpose of giving priority to the processing and consideration of unsolicited proposals by issuing a written order that declares that the Department will give priority to the processing and consideration of unsolicited proposals for certain types of Projects (or to a particular proposal), and describes the class or character of the proposals or Projects (or the particular proposal or Project) that are given priority. The priority order may either specify the term of the priority order, identify the submitted proposals (or proposal) that are subject to the priority order, or provide that the priority order will continue in effect until recalled by a subsequent order of the Department.

(2) Commencing on the effective date of the order giving priority, the Department may undertake expedited processing and consideration of unsolicited proposals (or a particular unsolicited proposal) for Transportation Projects of the class, category or description contained in the order. The limited resources of the Department, in such cases, will require either the postponement of, or delay in, the processing and consideration of unsolicited proposals for Projects that are not within a class, category or description that is subject to a priority order.

(3) By submitting an unsolicited proposal, each Proposer thereby waives and relinquishes every claim of right, entitlement or expectation that:

- (a) Its proposal will enjoy the benefit of a priority order; and
- (b) The processing and consideration of its proposal will not be subject to postponement or delay arising out of the Department’s issuance of an order that gives priority to another proposal or to proposals for different classes, categories or descriptions of Projects.

(4) The Department may, by written order, suspend the acceptance and consideration of proposals based on the types, classes, cost ranges, geographic areas of projects, or other factors as determined by the Department. The order will specify either the term of the suspension or that the suspension will continue until recalled by a subsequent order of the Department.

(5) Commencing on the effective date of the suspension order, the Department will refuse to accept unsolicited proposals or unsolicited proposals for Projects of the class, category or description contained in the order, and may, as stated in the order, cease further

processing and consideration of any such unsolicited proposals then currently under consideration by the Department.

(6) By submitting an unsolicited proposal, each Proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule.

(7) The State of Washington, the Department of Transportation, the Washington Transportation Commission, and their officers and employees, shall have no responsibility or liability of any nature for the preservation, confidentiality or safekeeping of any proposal that is subject to a suspension order under this rule and is submitted to the Department while that suspension order is in effect.

#### **468-600-220. Submission of Unsolicited Conceptual Proposals**

(1) Subject to WAC 468-600-210 through 215, any private entity or unit of government may submit an unsolicited Conceptual Proposal for a project to the Department for consideration under the Transportation Innovative Partnership Program.

(2) A proposal review fee in the amount prescribed by WAC 468-600-230 must accompany any unsolicited Conceptual Proposal submitted by a private entity or unit of government.

(3) The Proposer shall submit 20 copies, individually identified, of any unsolicited Conceptual Proposal in addition to the proposal bearing the signature of the authorized representative. The original proposal, required copies and processing fee shall be delivered to the Department.

(4) The Department will consider an unsolicited conceptual proposal only if:

(a) The proposed project is unique or innovative in comparison with, and is not substantially duplicative of, other transportation system projects included in the state transportation improvement program within the Department or, if it is similar to a project in the state transportation improvement program, the proposed project has not been fully funded by the State or any other public entity as of the date the proposal is submitted, or the proposal offers an opportunity to materially advance or accelerate the implementation of the project. Unique or innovative features that may be considered by the Department in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by State rules or regulations; and

(b) the conceptual phase includes all information required by and is presented in the format set out in WAC 468-600-540. Such information shall include a list of any proprietary information included in the proposal that the Proposer considers protected trade secrets or other information exempted from disclosure under either WAC 468-600-605 or RCW 47.29.190.

(5) The Department will not consider an unsolicited proposal for a project involving another state or local government unit of another state unless the Department and the appropriate representative of the other state or of the local government unit of the other state have entered into an agreement that permits the acceptance of unsolicited proposals for such a project.

#### **468-600-230. Fees to Accompany Unsolicited Proposals.**

(Reserved)

**468-600-232. Alternative Process Authorized.**

When the Department in its sole discretion deems it appropriate to do so given the nature of the proposal, the Department may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-240 through 370. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 to 47.29.270. Examples of possible alternative processes include:

(1) Selecting a proposal for development into a final agreement based on a unitary proposal instead of a two-step conceptual/detailed proposal process; and

(2) Proposers are ranked and selected based on the qualifications of the Major Partners, Major Subcontractors and Key Persons, which would result in a pre-development agreement being entered into that authorizes the Proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350;

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the State's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

**468-600-240. Contents and Format of Conceptual Proposals**

An unsolicited or competing Conceptual Proposal shall include at least the following information, unless waived by the Department, separated by tabs as herein described:

**(1) TAB 1: Qualifications and Experience.**

(a) Identify the legal structure of the private entity or consortium of private entities or of private and public entities (the "Team") submitting the proposal. Identify the organizational structure of the Team for the Project, the Team's management approach and how each Major Partner and Major Subcontractor identified as being a part of the Team as of the date of submission of the proposal fits into the overall Team.

(b) Describe the experience of each private entity involved in the proposed Project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other similarly sized engagements of each Major Partner and Major Subcontractor. The lead entity must be identified.

(c) Provide the names, addresses and telephone numbers of persons within the Team who may be contacted for further information.

(d) Include the address, telephone number, and the name of a specific contact person at a public entity for which the private entity or the Team or the primary members of the Team have completed a development project, public-private partnership project or design-build project.

(e) Include the resumes for those managerial persons within the Team that will likely be associated in a significant way with the Project development and implementation.

(f) Provide financial information regarding the private entity or Team and each Major Partner that includes, if available, the most recent independently audited financial statement of the private entity or Team and of each Major Partner, and which demonstrates their ability to perform the work and Project as set forth in the proposal, including ability to obtain appropriate payment and performance bonds.

(g) Submit executed disclosure forms, prescribed by the Department, for the Team, each Major Partner and any Major Subcontractor.

**(2) TAB 2: Project Characteristics**

- (a) Provide a topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.
- (b) Provide a description of the eligible Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects.
- (c) Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.
- (d) List the critical factors for the Project's success.
- (e) If the proposed Project does not conform with the state and local transportation plans or local comprehensive plans, outline the Proposer's approach for securing the Project's conformity with state and local transportation plans and local comprehensive plans or indicate the steps required for acceptance into such plans.
- (f) When a proposed Project is sited, in whole or in part, within the jurisdiction of a metropolitan planning organization or area commission on transportation, identify applicable regional and local approvals required for the project.
- (g) Provide an explanation of how the proposed transportation project would impact local transportation plans of each affected locality.
- (h) Provide a list of public transportation facilities and major apparent public utility facilities that will be crossed or affected by the Transportation Project and a statement of the Proposer's plans to accommodate such facilities.
- (i) Describe the role the Proposer anticipates the Department will have in the development, construction, operation, maintenance, financing, or any other aspect of the eligible Project.

**(3) TAB 3: Project Financing**

- (a) Provide a projected budget for the project or scope of work based on Proposer's prior experience on other scopes of work and projects or other cost projection factors and information.
- (b) Include a list and discussion of assumptions (*e.g.*, user fees, toll rates and usage of the facility) underlying all major elements of the plan for the Project.
- (c) Identify the proposed risk factors relating to the proposed Project financing and methods for dealing with these factors.
- (d) Identify any significant local, state or federal resources that the Proposer contemplates requesting for the Project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; the timing of any anticipated commitment; and its impact on project delivery.
- (e) Identify any aspect of the financial model for the Project that implicates or potentially implicates restrictions on the use of highway-related revenues under Article II, section 40 of the Washington Constitution, and explain how the financial model avoids conflicting with those restrictions.
- (f) Provide a conceptual estimate of the total cost of the Transportation Project.

**(4) TAB 4: Public Support/Project Benefit/Compatibility**

- (a) Identify who will benefit from the Project, how they will benefit and how the Project will benefit the overall transportation system.
- (b) Identify any anticipated government support or opposition, or general public support or opposition, for the Project.

- (c) Explain the strategy and plans that will be carried out to involve and inform the agencies and the public in areas affected by the Project.
- (d) Describe the significant social and economic benefits of the Project to the community, region or state and identify who will benefit from the Project and how they will benefit. Identify any state benefits resulting from the Project including the achievement of state transportation policies or other state goals.
- (5) All pages of a Conceptual Proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.
- (6) A Conceptual Proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the unsolicited Conceptual Proposal.
- (7) The Proposer shall include a list of any proprietary information included in the proposal which the Proposer considers protected trade secrets or other information exempted from disclosure under WAC 468-600-605.

**468-600-250. Contents and Format of Detailed Proposals.**

A Detailed Proposal shall include all information required in the Conceptual proposal under WAC 468-600-240, with additional discussion, description and details, and with updates and refinements as necessary to keep the document most current. In addition, the following information must be included, unless waived by the Department:

**(1) TAB 2: Project Characteristics.**

- (a) Provide a detailed description of the eligible Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.
- (b) Identify any significant local, state or federal services or practical assistance that the Proposer contemplates requesting for the Project. In particular, identify and describe any significant services that will need to be performed by the Department such as right-of-way acquisition or operation and maintenance of the completed Project.
- (c) Include a preliminary list of all significant federal, state, regional and local permits and approvals required for the Project. Identify which, if any, permits or approvals are planned to be obtained by the Department.
- (d) List the critical factors for the Project's success.
- (e) Identify the proposed preliminary schedule for implementation of the Project.
- (f) Describe the assumptions related to ownership, law enforcement and operation of the Project and any facility that is part of the Project.
- (g) Describe the payment and performance bonds, guarantees, letters of credit and other performance security, if any that the proposer will provide for the Project.
- (h) Identify any public improvements that will be part of the proposed Project that will constitute "public works" under RCW 47.29.020(5), the workers on which must be paid in accordance with Washington's Prevailing Rate of Wage Law, RCW 39.12, and any public improvements the workers on which must be paid in accordance with the federal Davis-Bacon Act, 40 USC sections 3141 to 3148.

**(2) TAB 3: Project Financing.**

(a) Identify the form and amount of any private capital contribution and the entities that will make such capital contributions. If other forms of contribution are proposed, describe the nature of the contributions, the fair market value (if applicable), and whether compensation for such contributions will be sought.

(b) If the proposal is for a concession agreement, provide the proposer's financial model and all capital costs, operating and maintenance costs (including reconstruction, resurfacing, restoration, and rehabilitation costs), revenues and other data and assumptions that make up the base case financial model.

(c) Provide an explanation of how funds for the Project will be segregated, accounted for and expended in a manner that ensures that any moneys protected under Article II, section 40 of the Washington Constitution be expended exclusively for the purposes authorized under that provision.

(d) Identify, to the extent possible, proposed financing team members, including banks, investment banks, equity investors, credit enhancement providers, bond trustees and legal counsel to the same.

**(3) TAB 5: Special Deliverables.**

(a) Provide a statement setting out the plan for securing all necessary real property, including proposed timeline for any necessary acquisitions.

(b) Provide proposed design, construction and completion guarantees and warranties.

(c) Include traffic studies and/or forecasts and related materials that establish project revenue assumptions, including, if any, user fees or toll rates, and usage of the facility.

(d) Provide such additional material and information as the Department may reasonably request.

**(4)** All pages of a proposal shall be numbered. Each copy of the proposal shall be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

**(5)** A proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the proposal.

**(6)** The Proposer shall include a list of any proprietary information included in the proposal which the Proposer considers protected trade secrets or other information exempted from disclosure under RCW 47.29.190 and WAC 468-600-605.

**468-600-300. Review, Evaluation and Selection of Proposals.**

**468-600-301. Additional Disclosure Requirements for Proposers of Solicited and Unsolicited Proposals.**

(1) In addition to the disclosure requirements of WAC 468-600-600, the Department may impose, after the submission of a proposal, any other special disclosure requirements the Department determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any Proposer.

(2) All Proposers must provide all the information required by this rule and by the Department. All Proposers and Key Persons must complete and submit the required disclosure form within the deadlines set by the Department. All Proposers and Key Persons must provide any documents required in the disclosure process, or other documents as determined by the Department, or their proposals may be rejected by Department.

(3) The Department may reject, or require the supplementation of, a proposal if the Proposer has not provided all information required in the disclosure form or if any information provided is not accurate, current or truthful. The failure or refusal of any Proposer to properly execute, fully complete, or accurately report any information required by the required disclosure shall be sufficient grounds for rejection of the proposal.

(4) Any change in the status of the Proposer, in the identity of any of the Key Persons, or the addition of any Key Persons must be reported to the Department within thirty (30) days of the known change, and those whose status has changed or who have been added as Key Persons will be required to submit the required disclosure information. For purposes of this section, a “change in the status of a Proposer” means a reorganization of the business structure or corporate structure of the Proposer or a Major Partner, or a change in ownership of the Proposer or a Major Partner amounting to a transfer of over twenty percent of the entity’s ownership.

(5) The burden of satisfying the Department’s disclosure requirements, both in terms of producing the disclosures and assuring their accuracy and completeness, resides with each Proposer.

(6) Each Proposer, by submitting a proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism harm to reputation or embarrassment that may result from any disclosure or publication of any material or information required or requested by the State in connection with the Proposer’s submission of a proposal. In submitting a proposal, the Proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against the Secretary, the State of Washington, the Commission, the Department and their officers and employees, for any damages that may arise therefrom.

(7) A public entity that submits a proposal may, prior to submission, request the Department to waive the disclosure requirements of this rule with respect to the corporate public entity and its officers. However, if the public entity proposes to enter into or establish a partnership or joint venture with a private sector partner to perform any substantial portion of the proposed Project (as opposed to the engagement of only a prime contractor or subcontractors), then disclosure of the private party must be made as if the private party is a Proposer, in accordance with this rule.

**468-600-305. Appointment of Evaluation Panel.**

The Commission shall appoint and direct an Evaluation Panel to commence a review and evaluation process as directed in these WACs. At a minimum, the Evaluation Panel must consist of:

- (1) Department staff;
- (2) An independent representative of a consulting or contracting firm with no interests in the project that is prohibited from becoming a project manager for the project and bidding on any part of the project;
- (3) An observer from the State Auditor's Office or the Joint Legislative Audit and Review Committee;
- (4) A person appointed by the Commission; and
- (5) A financial expert.

**468-600-310. Preliminary Review of Proposals.**

(1) For solicited proposals, after the close of the proposal period, the Department will conduct a preliminary review and certify receipt of those submitted proposals that have met the following criteria:

- (a) the proposal is complete;
- (b) the Proposal is responsive; and
- (c) the proposal meets any additional procedural or process requirements prescribed by the State.

Solicited proposals certified by the Department under this subsection will be forwarded to the Evaluation Panel under WAC 468-600-305.

(2) Unsolicited Conceptual Proposals submitted under WAC 468-600-220 will be reviewed by the Evaluation Panel, as created and assembled under WAC 468-600-305. The Evaluation Panel will initially determine whether the Conceptual Proposal is eligible for evaluation pursuant to WAC 468-600-(moratorium), WAC 468-600-(unsolicited eligibility) and WAC 468-600-(dept mgmtn of unsolicited). If not, the Evaluation Panel will not proceed further with its evaluation and the Department may return the proposal to the Proposer. If the Conceptual Proposal is eligible for evaluation, the Evaluation Panel will assess:

- (a) Whether the proposal is complete;
- (b) Whether the Proposer appears qualified;
- (c) Whether the proposal appears to satisfy the requirements of WAC 468-600-240;
- (d) Whether the project as proposed appears to be technically and financially feasible;
- (e) Whether the project as proposed appears to have the potential of enhancing the state transportation system; and
- (f) Whether the project as proposed appears to be in the public interest.

(3) The Evaluation Panel will report the results of its evaluation and its recommendation to the Commission. The recommendation will not include sensitive business, commercial or financial information or trade secrets as described in WAC 468-600-605.

**468-600-315. Commission Review of Unsolicited Conceptual Proposals.**

Following an assessment by the Evaluation Panel that an unsolicited Conceptual Proposal merits further review, the Commission will review the recommendation and approve or disapprove the proposal for further evaluation and action by the State. If approved for further review, the Commission shall direct the Proposer to prepare a detailed proposal pursuant to WAC 468-600-250.

#### **468-600-320. Competing Proposals.**

(1) If the Commission grants approval of a conceptual proposal for further evaluation and review, within 30 days of the Commission's approval the Department shall provide public notice of the proposed project. This notice shall:

- (a) Be published in a newspaper of general circulation and upon such electronic website providing for general public access as the Department may develop for such purpose;
- (b) Be provided to any county, city, metropolitan service district, or transportation district in which the project will be located;
- (c) Be provided to any person or entity that expresses in writing to the Department an interest in the subject matter of the unsolicited Conceptual Proposal and to any member of the Legislature whose House or Senate district would be affected by such proposal;
- (d) Outline the general nature and scope of the unsolicited Conceptual Proposal, including the location of the transportation project and the work to be performed on the project; and
- (d) Specify the address to which any competing Conceptual Proposal must be submitted.

(2) The Department may also elect to deliver such notice directly to any person or entity the Department believes may have an interest in submitting a competing Conceptual Proposal.

(3) Any entity that elects to submit a competing Conceptual Proposal for the proposed project shall submit a written letter of intent to do so not later than 30 calendar days after the Department's initial publication of notice. Any letter of intent received by the Department after the expiration of the 30-day period shall not be valid and any competing Conceptual Proposal submitted thereafter by a private or governmental entity that has not submitted a timely letter of intent shall not be considered by the Department.

(4) An entity that has submitted a timely letter of intent must submit its competing Conceptual Proposal to the Department not later than 120 calendar days after the Department's initial publication of notice under section (1) of this rule, or such other time as the Department provides in the notice. The competing Conceptual Proposal must:

- (a) Be signed by an authorized representative of the Proposer;
- (b) Be accompanied by the processing fee for Conceptual Proposals required under WAC 468-600-230; and
- (c) Include the information and be organized in the manner required of an unsolicited Conceptual Proposal under WAC 468-600-240.

(4) Any competing Conceptual Proposal that is received within the time provided in subsection (4) above must be forwarded to the Evaluation Panel as provided in WAC 468-600-310. The Panel must (a) evaluate the competing Conceptual Proposal under the criteria specified in WAC 468-600-310; and (b) determine whether the competing Proposal(s) differ from the original unsolicited Conceptual Proposal in such a significant and meaningful manner that they should be treated as an original unsolicited Conceptual Proposal. If the Evaluation Panel believes that a proposal submitted as a competing proposal should be treated as an original unsolicited Conceptual Proposal and that it satisfies the requirements of WAC 468-600-240, the Evaluation Panel shall forward the proposal to the Commission for preliminary review and approval under WAC 468-600-315, and the proposal shall thereafter be processed under these rules in the same manner as an unsolicited Conceptual Proposal. If the competing Conceptual Proposal is not to be

treated as an original unsolicited conceptual proposal, the competing Conceptual Proposal will be reviewed by the Evaluation Panel as provided in WAC 468-600-330 through 350.

#### **468-600-330. Proposal Evaluation Factors and Criteria.**

For solicited proposals, the Evaluation Panel shall assess the certified proposals based on the unique project-specific evaluation criteria identified in the solicitation documents, including any written amendments or clarifications thereto, and upon any other factors the Panel believes is necessary to ensure a successful project that benefits the public interest.

For unsolicited and competing proposals, the Evaluation Panel must consider the following factors:

(1) **Qualifications and Experience.** Has the Proposer created a team that is qualified, managed, and structured in a manner that will enable the team to complete the proposed project and perform the proposed scope of work?

(a) **Experience with Similar Infrastructure Projects.** Have members of this team previously worked together or in a substantially similar consortium or partnership arrangement constructing, improving operating, maintaining or managing transportation infrastructure? Has the lead firm managed, or any of the member firms worked on, a similar public-private partnership project?

(b) **Demonstration of Ability to Perform Work.** Does the team possess the necessary financial, staffing, equipment, and technical resources to successfully complete the project and perform the proposed scope of work? Do the team and/or member firms have competing financial or workforce commitments that may inhibit success and follow-through on this project?

(c) **Leadership Structure.** Is one firm designated as lead on the project? Does the organization of the team indicate a well thought out approach to managing the project? Is there an agreement/document in place between members?

(d) **Project Manager's Experience.** Is a Project Manager identified, and does this person work for the principal firm? If not, is there a clear definition of the role and responsibility of the Project Manager relative to the member firms? Does the Project Manager have experience leading this type and magnitude of project?

(e) **Management Approach.** Have the primary functions and responsibilities of the management team been identified? Have the members of the team developed an approach to facilitate communication among the project participants? Has the firm adequately described its approach to communicating with and meeting the expectations of the state?

(f) **Financial Condition.** Is the financial information submitted on the firms sufficient to determine the firms' capability to fulfill its obligations described in the project proposal, and is that capability demonstrated by the submitted information?

(g) **Project Ownership.** Does the proposal identify the proposed ownership arrangements for each phase of the project and clearly state assumptions on legal liabilities and responsibilities during each phase of the project?

(h) **Competitive Subcontracting.** To what extent have adequate procurement policies been adopted by the Proposer to ensure opportunities for competitive procurement of work, services, materials and supplies that the Proposer will outsource?

(2) **Project Characteristics.** Is the proposed project technically feasible?

- (a) **Project Definition.** Is the project described in sufficient detail to determine the type and size of the project, the location, all proposed interconnections with other transportation facilities, the communities that may be affected, and alternatives (e.g. alignments) that may need to be evaluated?
- (b) **Proposed Project Schedule.** Is the time frame for project completion clearly outlined? Is the proposed schedule reasonable given the scope and complexity of the project?
- (c) **Quality Management.** Does the Proposer present a quality management plan, including quality control and quality assurance processes, that are good industry practice and are likely to result in delivery of a project and services that meet the Department's standards and comply with contract requirements?
- (d) **Operation.** Does the Proposer present a reasonable statement setting forth plans for operation of the project or facilities that are included in the project?
- (e) **Technology.** Is the proposal based on proven technology? What is the degree of technical innovation associated with the proposal? Will the knowledge or technology gained from the project benefit other areas of the state or nation? Does the technology proposed maximize interoperability with relevant local and statewide transportation technology? Can the proposed project upgrade relevant local technology?
- (f) **Conforms to Laws, Regulations, and Standards.** Is the proposed project consistent with applicable state and federal statutes and regulations, or reasonably anticipated modifications of state or federal statutes, regulations or standards? Does the proposed design meet applicable state and federal standards?
- (g) **Federal Permits.** Is the project outside the purview of federal oversight, or will it require some level of federal involvement due to its location on the National Highway System or Federal Interstate System or because federal permits are required? Does the Proposal identify the primary federal permits and agencies that will be involved in review and oversight of the project?
- (h) **Meets/Exceeds Environmental Standards.** Is the proposed project consistent with applicable state and federal environmental statutes and regulations? Does the proposed design meet applicable state environmental standards? Does the proposal adequately address air quality issues?
- (i) **State and Local Permits.** Does the proposal list the required permits and provide a schedule for obtaining them? Are there known or foreseeable negative impacts arising from the project? If so, does the proposal outline a plan to address those negative impacts? Are alternatives to standards or regulations needed to avoid those impacts that cannot be addressed?
- (j) **Right of Way.** Does the proposal set forth a method or plan to secure all property interests required for the transportation project?
- (k) **Maintenance.** Does the Proposer have a plan to maintain any facilities that are part of the proposed transportation project in conformance with Department standards? Does the proposal clearly define assumptions or responsibilities during the operational phase including law enforcement, toll collection and maintenance? Under the proposal, will maintenance and operation of any new facilities be consistent with standards applied throughout the highway system and use the same work-forces and methods?
- (3) **Project Financing.** Has the Proposer provided a financial plan that allows access to the necessary capital to make a substantial contribution of non-state, private sector, or other innovative financing resources to the financing of the facility or project?

- (a) **Financing.** Did the Proposer demonstrate evidence of its experience, ability and commitment to provide a sufficient private-sector contribution or other innovative financing contribution of funds or resources to the project as well as the ability to obtain the other necessary financing?
- (b) **Conformance with RCW 47.29.060.** Does the proposed financing plan conform to any requirements of state-issued debt under RCW 47.29.060? If the proposed financing plan is not in conformance, has the Proposer committed to seeking any necessary legislative or other state approvals in order to proceed with the financing plan as proposed?
- (c) **Financial Plan.** Does the financial plan demonstrate a reasonable basis for funding project development and operations? Are the assumptions on which the plan is based well defined and reasonable in nature? Are the plan's risk factors identified and dealt with sufficiently? Are the planned sources of funding and financing realistic? Is the Proposer willing to place private capital at risk in order to successfully deliver the project? Does the Proposer adequately identify sources of non-state funding that it anticipates including in the project financing, and does the Proposer provide adequate assurance of the availability of those funds and the reliability of the funding sources?
- (d) **Estimated Cost.** Is the estimated cost of the project reasonable in relation to the cost of similar projects?
- (e) **Life Cycle Cost Analysis.** Does the proposal include an appropriately conducted life-cycle cost estimate of the proposed project and/or facility? How does the life-cycle cost impact the projected rate of return?
- (f) **Financial Model.** If the procurement is for a concession agreement, does the proposal present a sound base case financial model? Are the assumptions in the financial model reasonable and realistic?
- (g) **Business Objective.** Does the Proposer clearly articulate its reasons for pursuing this project? Do its assumptions appear reasonable?
- (4) **Public Support.** Has the Proposer demonstrated sufficient public support for the proposed project or proposed a reasonable plan for garnering that support?
  - (a) **Community Benefits.** Will this project bring a significant transportation and economic benefit to the community, the region, and/or the state? Are there ancillary benefits to the communities because of the project?
  - (b) **Community Support.** What is the extent of known support or opposition for the project? Does the project proposal demonstrate an understanding of the national and regional transportation issues and needs, as well as the impacts this project may have on those needs? Is there a demonstrated ability to work with the community? Have affected local jurisdictions expressed support for the project?
  - (c) **Public Involvement Strategy.** What strategies are proposed to involve local and state elected officials in developing this project? What level of community involvement is contemplated for the project? Has the Proposer articulated a clear strategy for informing and educating the public and for obtaining community input throughout the development and life of the project?
- (5) **Project Compatibility.** Is the proposed project compatible with, or can it be made compatible with state and local comprehensive transportation plans?
  - (a) **Compatibility with the Existing Transportation System.** Does this project propose improvements that are compatible with, or that can be made compatible with,

the present and planned transportation system? Does the project provide continuity with existing and planned state and local facilities?

(b) **Fulfills Policies and Goals.** Does the proposed project help achieve performance, safety, mobility or transportation demand management goals? Does the project improve connections among the transportation modes?

(c) **Conformity with Local, Regional and State Transportation Plans.** Does the project conform with, or can it achieve conformity with, city and county comprehensive plans and regional transportation plans? Does the project conform with, or can it achieve conformity with, plans developed by the Commission and any applicable regional transportation plans or local transportation programs? If not, are the steps proposed in the proposal to achieve conformity with such plans adequate and appropriate to provide a high likelihood that the project and the applicable plans can be brought into conformity?

(d) **Economic Development.** Will the proposed project enhance the state's economic development efforts? Is the project critical to attracting or maintaining competitive industries and businesses to the region, consistent with stated objectives?

#### **468-600-331. Factors for Proposals that Include Tolling.**

If the project financing component of a proposal includes a plan to impose tolls, the Evaluation Panel shall specifically consider:

- (1) The opinions and interests of units of government encompassing or adjacent to the path of the proposed tollway project in having the tollway installed;
- (2) The probable impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general;
- (3) The extent to which funding other than state funding is available for the proposed tollway project and the extent to which resources other than tolls would be required to be established and/or maintained as necessary security to support such a financing;
- (4) The likelihood that the estimated use of the tollway project will provide sufficient revenues to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including the repayment of any loans to be made from moneys in the Transportation Innovative Partnerships Account created under RCW 47.29.230 or other accounts;
- (5) With respect to tollway projects, any portion of which will be financed with state funds or Department loans or grants:
  - (a) The relative importance of the proposed tollway project compared to other proposed tollways; and
  - (b) Traffic congestion and economic conditions in the communities that will be affected by competing tollway projects; and
- (6) The effects of tollway implementation on other major highways in the state system and on community and local street traffic.

#### **468-600-340. Proposer Presentations.**

At any time during the evaluation process, the Evaluation Panel may request Proposers to make presentations to the Panel. Proposers shall be afforded not less than ten (10) business days following written notification from the Panel to prepare such presentations. The format of these presentations will include a formal presentation by the Proposer, followed by any questions the Evaluation Panel may have pertaining to the project proposal or the presentation. These meetings will allow the Evaluation Panel to

seek clarification of project elements and complete deliverable requirements, and provide Proposers with the opportunity to further explain their proposed projects. If there is an issue to which the Proposer is unable to respond during the formal presentation, the Evaluation Panel may, at its discretion, grant the Proposer a reasonable period of time in which to submit a written response.

**468-600-345. Required Supplements or Refinements to Proposals.**

(1) The Department reserves the right, to be exercised in its sole and absolute discretion, to require or to permit Proposers to submit, at any time, revisions, clarifications to, or supplements of their previously submitted proposals. The Department may, in the exercise of this authority, require Proposers to add features, concepts, elements, information or explanations that were not included in their initial proposals, and may require them to delete features, concepts, elements, information or explanations that were included in their initial proposals. A Proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by the Department shall constitute sufficient grounds for the Department to elect to terminate consideration of its proposal.

(2) After the Department's opening and review of proposals, the Department may issue or electronically post an addendum to the request for proposals that:

- (a) Requires Proposers to address or add physical features or elements, and information or explanations that were not included in their initial proposals; or
- (b) Requires Proposers to delete physical features or elements that were included in their initial proposals; or
- (c) Change the method by which the Department will send any such addendum that it issues by a method other than electronic posting to all Proposers to continue in the proposal process.
- (d) Any addendum issued will contain a deadline by which the Proposers must submit to the Department any additions to, modifications of or deletions from their proposals.

**468-600-350. Evaluation Panel Recommendation to Commission.**

(1) After reviewing the proposals and hearing presentations from Proposers, the Evaluation Panel will prepare a written determination, based on facts and circumstances presented in the proposals and the presentations, that one or more proposals merit selection and advancement into a contract negotiation phase or to contract execution. In its written determination regarding any proposal, the Evaluation Panel may specify conditions that it recommends the Proposer be required to satisfy before proceeding to contract negotiations. By way of example, such conditions may include, but are not limited to:

- (a) Requiring the Proposer to provide additional information or clarification concerning elements or parts of its proposal;
- (b) Requiring the Proposer to develop and submit additional information confirming the technical feasibility of the proposed Project;
- (c) Requiring the Proposer to develop and submit additional information confirming that the proposed Project complies with or can be brought into compliance with relevant local and state transportation plans, restrictions on property use, and

environmental laws, or that the Project and the applicable plans, restrictions and environmental laws can otherwise be brought into conformity;

(d) Requiring the Proposer to commit in writing to the Department to undertake good faith efforts to modify or adjust the proposal in specific ways, or to incorporate steps, characteristics or features that the Department identifies as necessary or desirable to enhance the feasibility, public acceptance, transportation efficiency, or economy in execution or operation, of the Project;

(e) Otherwise requiring the Proposer to develop and present revisions to, or alternatives within, the proposal that will permit the Department to obtain best value based on the requirements and evaluation criteria set forth in the notice or request for proposals and based on knowledge obtained by the Department by virtue of its review and evaluation of the proposals; and

(f) Requiring the Proposer to enter into an interim agreement, on terms satisfactory to the Proposer and the State, under which Proposer will provide services to the Department in connection with the development of the proposal or further development of the project, including assistance to the Department in obtaining any necessary regulatory approvals.

(2) The Evaluation Panel will report its assessments and recommendations to the Commission.

#### **468-600-355. Commission Review and Selection of Proposals.**

The Commission shall review the proposals, the assessments and the recommendations of the Evaluation Panel. Based on that review, the Commission may:

(1) Select one proposal to advance to execution of a contract or development agreement; or

(2) Select one proposal to advance to negotiations of a contract or development agreement; or

(3) Select one proposal to advance to execution or negotiations of a contract or development agreement, subject to the Proposer's willingness and ability to satisfy specified conditions; or

(4) Pursuant to WAC 468-600-360, select more than one proposal from which to conduct competitive negotiations; or to continue competitive negotiations for a specified period of time; or

(5) Reject all proposals.

For purposes of this section, competitive negotiations means negotiations authorized under WAC section 468-600-360, for the purposes of refining and arriving at a final selection of a Proposer. This term does not refer to negotiations for a contract or development agreement as provided in WAC 468-600-710.

#### **468-600-360. Commission's Authority to Elect Competitive Negotiations.**

(1) In addition to the Commission's ability to exercise any alternative process permitted under WAC 468-600-232, the Commission may authorize, at its option, competitive negotiations with more than a single Proposer as a means of selecting from among competing Proposals submitted under these rules. Negotiations under this section are part of the proposal evaluation process and do not constitute the negotiation of a project agreement.

(2) The Commission may announce its election to conduct competitive negotiations:

(a) In any notice issued for solicited proposals under WAC 468-600-105; or

- (b) By written notice, by mail or by electronic means, to the Proposers, issued at any time following the State's receipt of proposals under WAC 468-600-220.
- (3) In any communication under subsection (2) of this rule, or by notice to the Proposers issued by mail or by electronic means at any time after the receipt of proposals, the Commission may announce that it will initiate competitive negotiations with all Proposers who submitted responsive proposals, or only with Proposers who qualify to negotiate because the state has determined that their proposals fall within a competitive range.
- (4) When the Commission elects to negotiate only with Proposers within a competitive range, then after the Evaluation Panel's evaluation of proposals in accordance with the criteria set forth in the notice or request for proposals, the Commission will determine the Proposers in the competitive range.
- (a) For purposes of this subsection (4), the Proposers in the competitive range consist of those Proposers whose proposals, as determined by the Commission in its discretion, have a reasonable chance of being determined the best proposal as the result of the evaluations conducted by the Evaluation Panel under WAC 468-600-350. In determining which proposals fall within the competitive range, the Commission may consider whether its preliminary evaluation of proposals establishes a natural break in the preliminary scores of the proposals that suggests those proposals that are sufficiently competitive to be included in the competitive range.
- (b) The Department will provide written notice to all Proposers, by mail or by electronic means, of the proposals the Commission determines to fall within the competitive range. A Proposer whose proposal is not within the competitive range may submit a written protest of the Commission's evaluation and determination of the competitive range within 14 calendar days after the date of the Department's notice. A Proposer's written protest must state facts and argument that demonstrate how the competitive range determination was flawed or how the Commission's determination constituted an abuse of discretion. If the Department receives no written protest concerning the proposed selection listing within the 14 calendar day period, then the Department will proceed with negotiations with the Proposers whose proposals fell within the competitive range.
- (c) In response to a timely filed protest, the Commission will issue a written decision that resolves the issues raised in the protest. The Commission will make its written determination available, by mail or by electronic means, to the protesting Proposer and to the Proposers falling within the competitive range. The Commission's written decision under this subsection shall constitute a final order under RCW 34.05.461.
- (5) The object of competitive negotiations, which the Department may conduct concurrently with more than one Proposer or serially, is to maximize the State's ability to obtain best value and to permit Proposers to develop revised proposals. Therefore, the negotiations may include, but shall not be limited to:
- (a) Informing Proposers of deficiencies in their proposals;
  - (b) Notifying Proposers of parts of their proposals for which the Department would like additional information; and
  - (c) Otherwise allowing Proposers to develop revised proposals that will permit the State to obtain the best proposal based on the requirements and evaluation criteria set forth in the notice or request for proposals.
- (6) The scope, manner and extent of negotiations with any Proposer are subject to the

discretion of the Department. To prevent the disclosure of proposal information to a Proposer's competitors, the Department shall conduct negotiations with Proposers before the nature of the proposals, information about the proposed Project, or proposal information have been made public under WAC 468-600-600. In conducting negotiations, the Department:

- (a) Shall treat all Proposers fairly and shall not engage in conduct that favors any Proposer over another;
- (b) Shall not reveal to another Proposer a Proposer's unique technology, unique or innovative approaches to Project design, management or financing, or any information that would compromise the Proposer's intellectual property, trade secrets or sensitive business information; or
- (c) Shall not reveal to another Proposer a Proposer's price or pricing information, provided, however, that the Department may inform a Proposer that the Department considers a Proposer's price or pricing information to be too high or too low.

(7) The Evaluation Panel must further evaluate the proposals subjected to the competitive negotiation process, and recommendations to the Commission for their action under WAC 468-600-350 (1), (2), (3) or (5).

#### **468-600-365. Protests of Rejection of Proposal/Award of Contract to Competitor in Competing Proposals Context**

(1) At least fourteen (14) calendar days prior to the final selection of the successful Proposer in any competitive proposal selection process, the Department will give, electronically or otherwise, written notice to all participating Proposers of the Commission's apparent selection of the successful Proposer. A Proposer who would be adversely affected by the selection announced in the notice may, within 14 calendar days after the date of the Department's notice, submit to the Department a written protest of the selection of the apparent successful Proposer.

(2) For purposes of this rule, a protesting Proposer is adversely affected by a selection only if the Proposer has submitted a responsive competing proposal and is next-in-line for selection. In other words, the protesting Proposer must demonstrate that all higher-scoring Proposers are ineligible for selection because either:

- (a) The higher-scoring proposals were not responsive to the requirements stated in the Department's solicitation documents; or
- (b) The Department committed a substantial violation of a provision in the Department's notice requesting competitive negotiation, in these rules, or in RCW 47.29, or otherwise abused its discretion, in evaluating the revised proposals.

(3) A Proposer's written protest must state facts and argument that demonstrate how the selection process was flawed or how the Commission's selection of the apparent successful Proposer constituted an abuse of the Commission's discretion. If the Commission receives no written protest concerning the proposed selection listing within the 14-day period, then the selection of the successful Proposer automatically shall become effective on the fifteenth (15th) calendar day after the Department first transmitted or otherwise delivered its written notice of the apparent successful Proposer.

(4) In response to a Proposer's timely filed protest that complies with this rule, the Commission will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the Commission may request further information from the protesting Proposer and from the apparent successful Proposer identified in the Department's notice issued under subsection (1) of this rule. The Commission will make

its written determination available, by mail or by electronic means, to the protesting Proposer and to the apparent successful Proposer identified in the Department's notice issued under subsection (1) of this rule. The Commission's written decision under this subsection shall constitute a final order under RCW 34.05.461.

**468-600-370. Notification of Apparent Successful Proposer; Pre-Negotiation Activities Authorized.**

(1) Upon the Commission's selection of a proposal under WAC 468-600-355 and upon expiration of the protest period, the Department shall notify the Proposer of its intent to execute a contract or development agreement or to enter negotiations on a contract and/or development agreement.

(2) Upon the Commission's provisional selection of a proposal subject to satisfaction of conditions, and upon expiration of the protest period, the Department shall notify the Proposer of the conditions. The Proposer shall have a period of time, set forth in the department's notice, but to be at least ten (10) calendar days, from receipt of the Department's notification to elect to proceed under specified conditions. If the Proposer elects to proceed, the Department shall work with the Proposer to develop a plan for satisfying the conditions. If the plan entails entry into an interim agreement, the agreement will conform to all relevant requirements of chapter 47.29 RCW and these rules.

(3) After the Commission's selection or provisional selection of a proposal, the Department and the Proposer may confer on any matter pertinent to refinement of the proposal.

**468-600-600. Public Records and Public Disclosure.**

(1) Upon written request and within a reasonable time, the Department shall provide records relating to project proposals for inspection in accordance with chapter 42.17 RCW and these rules.

(2) The Department may charge fees to cover its reasonable and actual costs in responding to public records requests. Such costs may include but are not limited to costs associated with locating records, separating exempt from nonexempt records, monitoring the requester's inspection of requested records, copying records and delivering copies of requested records. In accordance with RCW 42.17.300, the Department may charge fees calculated to reimburse it for its reasonable and actual costs as authorized by law.

(3) The Department may prepare an estimate of the costs of responding to any request for public records, and may require payment of all or a portion of the estimated costs before acting on the request.

(4) Records related to a proposal for a Project submitted to the Department under the Transportation Innovative Partnerships Program are exempt from disclosure under chapter 42.17 RCW until the Department completes its evaluation of the proposed project and has selected the proposal for negotiation or execution of an agreement.

(5) Notwithstanding section (4) of this rule, sensitive business, commercial or financial information that is not customarily provided to business competitors that is submitted to the Department in connection with a proposed Project is exempt from disclosure under chapter 42.17 RCW.

(6) On the Department's receipt of a request pursuant to RCW 42.17.260, for the disclosure of records or information that have been submitted to the Department by a Proposer under the program authorized by RCW 47.29, the Department will notify the Proposer of the request and provide the Proposer a reasonable opportunity to demonstrate that all or part of the requested records or information are exempt from disclosure under chapter 42.17 RCW, the Public Records law; RCW 19.108, the Uniform Trade Secrets Act; RCW 47.29, the Transportation Innovative Partnership Act or other applicable law recognizing the confidentiality of public records and information. In determining whether the information or records are exempt from disclosure, the Department will consider the evidence and objections to disclosure presented by the Proposer, but as custodian of the records or information, the Department must make the initial determination of the records that may be withheld from disclosure.

(7) An affected Proposer who seeks to demonstrate that public records pertaining to it are exempt from disclosure must respond to the Department with its evidence and objections within four working days of the Department's issuance of notice of the request to the Proposer. After considering the Proposer's evidence and objections, the Department will inform the Proposer of its disclosure decision, giving the Proposer no fewer than three working days in which to institute appropriate proceedings in its own behalf to protect the Proposer's interests in preventing the disclosure or maintaining the confidentiality of the records or information. The Proposer shall be exclusively responsible for all costs, expenses and attorney fees incurred in taking any action to prevent the disclosure of information or records under this section. The Department shall not make a disclosure of records or information while an action by the proposer to enjoin disclosure thereof is pending under RCW 42.17.330.

**468-600-605. Designation of Sensitive Business, Commercial or Financial Information and Trade Secrets**

(1) The following procedure shall be followed by Proposers to designate information as “sensitive business, commercial or financial information” under RCW 47.29.190: each individual page of a proposal that contains sensitive business, commercial or financial information must be clearly marked “Sensitive Business, Commercial or Financial Information.”

(2) A Proposer may desire that certain information be considered “trade secret” information for purposes of applying the public records exemption set out in RCW 42.17.200. To qualify for that exemption, trade secret information must meet the following criteria:

- (a) Not be the subject of a patent;
- (b) Be known only to a limited number of individuals within an organization;
- (c) Be used in a business that the organization conducts;
- (d) Be of potential or actual commercial value; and
- (e) Be capable of providing the user with a business advantage over competitors not having the information.

(3) The following procedures shall be followed by the Proposer to designate information as trade secret:

(a) Each individual page of a proposal, plan or progress report that contains trade secret

information must be clearly marked trade secret;

(b) Written substantiation describing what information is considered trade secret and why must accompany the document. The written substantiation shall address the following:

- (i) Identify which portions of information are claimed trade secret;
- (ii) Identify how long confidential treatment is desired for this information;
- (iii) Identify any pertinent patent information;
- (iv) Describe to what extent the information has been disclosed to others, who knows about the information, and what measures have been taken to guard against undesired disclosure of the information to others;
- (v) Describe the nature of the use of the information in business;
- (vi) Describe why the information is considered to be commercially valuable;
- (vii) Describe how the information provides a business advantage over competitors;
- (viii) If any of the information has been provided to other government agencies, identify which one(s); and
- (ix) Include any other information that supports a claim of trade secret.

(4) Notwithstanding a Proposer’s designation of information as constituting “trade secret,” and subject to a Proposer’s opportunity to object to disclosure under WAC 468-600-605, the Department will independently assess whether the trade secret exemption applies when responding to a public records request.

**468-600-700. Agreements for Projects****468-600-705. General Preconditions for Entering into Agreements.**

The following are preconditions of any agreement that will be entered into between the State and a private sector partner:

- (1) The Department must seek to adopt contracting techniques that represent the best practices in use by owners of facilities;
- (2) To the extent permitted by law, protection must be provided for local contractors to participate in any subcontracting opportunities on projects;
- (3) Projects that use tolling technology must maintain standards that are consistent with any standards adopted or widely used by the State;
- (4) Provision must be made for patrolling and law enforcement on state-owned transportation facilities, as approved by the Washington State Patrol for facilities within their jurisdiction;
- (5) Any debt to be issued to pay for the construction of a state-owned transportation facility that is secured by public funds must conform to RCW 47.29.060, or if not in conformance, any agreements reached must be conditioned upon obtaining necessary legislative approval of alternative financing provisions;
- (6) The public involvement plan must provide that all forums, workshops, open houses or public meetings be administered and attended by the public sector partner; and
- (7) Any project with a capital cost in excess of \$300 million must establish an advisory committee, consisting of at least five but not more than nine members, who shall be appointed by the Commission.

**468-600-710. Negotiation of Agreement**

A proposal or proposals selected by the Commission for negotiation of a final agreement shall be referred to a negotiation team within the Department. The team shall be responsible for negotiating the final agreement with the Proposer. Each final agreement will define the rights and obligations of the State and the respective Proposer with regard to the project. Agreements must contain all provisions in WAC 468-600-705 and WAC 468-600-715, and must allocate responsibilities under WAC 468-600-720.

**468-600-715. Mandatory Terms of Agreements.**

Any final agreement must include the following provisions:

- (1) If public moneys are used to pay any costs of construction of public works that is part of an eligible project, the construction contract shall contain provisions that require payment of workers under the contract in accordance with RCW 39.12; and
- (2) Any maintenance provisions on a public facility must be provided in a manner consistent with collective bargaining agreements, the personnel reform act, and civil service laws in effect on any portion of the project that constitutes a public facility.

**468-600-720. Terms to be Negotiated between the Parties.**

Any final agreement must contain terms that address at least the following issues:

- (1) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;
- (2) How the partners will share management of the risks of the project;
- (3) How the partners will share the costs of development of the project;
- (4) How the partners will allocate financial responsibility for cost overruns;
- (5) The consequences for nonperformance;

- (6) The incentives for performance;
- (7) The invoicing and payment procedures and schedules to be followed to the extent that the Department or State is to pay for the work, and the accounting and auditing standards to be used to evaluate work on the project; and
- (8) An agreement for the construction of a public improvement as part of an eligible project shall provide and be approved for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project. Furthermore, the Department shall determine that adequate security exists to address any default or non-performance by the private sector partner or other contractual claims of the Department against the Proposer; and
- (9) For projects that revert to public ownership, responsibilities for reconstruction or renovation that bring the facility up to government standards before reversion to the State.

#### **468-600-722. State Objection to Subcontractors**

- (1) Prior to the execution of any contract with a Proposer, the Proposer must provide the Department with a list of all Major Subcontractors who will perform work in the construction, operation or maintenance of the Project. All subcontractors must be legally eligible to perform or work on public contracts under federal and Washington law and regulations. No subcontractor will be accepted who is ineligible to receive public works contracts in the State of Washington.
- (2) If the Department has reasonable objection to any proposed subcontractor, the Department is authorized to require, before the execution of a contract, an apparently successful Proposer to submit an acceptable substitute. In such case, the Proposer must submit an acceptable substitute, and the contract may, at the Department's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. The Department will set a maximum time period from the date of the Department's written demand for substitution within which to make an acceptable substitution. A Proposer's failure to make an acceptable substitution at the end of the time period will constitute sufficient grounds for the Department to refuse to execute a contract, without incurring any liability for the refusal. In setting a maximum time period, the Department shall consider the scope of the subcontract, availability of other subcontractors, and whether the disapproved subcontractor is identified in the proposal as an equity contributor or source of other financial support to the Project relied on by the Proposer. Following such identification, the Proposer shall be granted an additional maximum timer period as determined by the Department to conclude negotiations of acceptable terms and conditions with that substitute Major Subcontractor.
- (3) The Department may not require any Proposer to engage any subcontractor, supplier, other person or organization against whom the Proposer has reasonable objection.

#### **468-600-725. Cessation of Negotiations.**

The Department must establish a maximum time period allowed for conducting negotiations on a potential project or development agreement(s). Such time period may be established in rule, in the solicitation document described in WAC 468-600-105, or as a condition of selecting a particular Proposer or Proposers. If the Department elects to conduct competitive negotiations under WAC 468-600-360, any deadline established for conducting negotiations must be equitably applied to all Proposers engaged in

negotiations. The Department may extend a maximum negotiating time period if it determines extension to be in the interests of the State.

**468-600-730. Legal Sufficiency Review of Final Agreement**

On completion of a final agreement, the Attorney General will review it for legal sufficiency. When conducting that review, the Attorney General shall:

- (1) Recognize that the agreement is the product of a partnership; and
- (2) Defer to the business judgment of the Department and the Commission concerning the assignment of risks and the incentives provided within the agreement.

**468-600-735. Commission Analysis Required.**

Before any agreements are executed, the Commission must: (1) conduct a financial analysis that fully discloses all costs and cost estimates, including the costs of any financing, and all estimated project revenues; and (2) compare the Department's internal ability to complete the project that documents the advantages of completing the project as a public-private partnership versus solely as a public venture.

**468-600-740. Publication of Contents of Proposed Agreement.**

If a tentative agreement has been reached, before the Commission may take any action on such agreement, an executive summary describing all material elements of the agreement must be prepared and made available to the public. The Department must publish notice of existence of the agreement in each county that is, or could potentially be, affected by the project. The published notice must generally describe the nature of the project, the anticipated communities that the project might impact, and how summary level information on the proposed agreement can be obtained. Such notice must be provided not less than 20 calendar days before the public hearing required under WAC 468-600-741.

**468-600-741. Public Hearings on Proposed Project and Agreement.**

Prior to taking action on any tentative agreement, the Commission must hold an informational session and public hearing in the county seat of the boundaries of the proposed project with at least 20 calendar days' advance notice. Notice of such meeting may be provided in conjunction with the publication of the notice under WAC 468-600-740.

**468-600-742. Twenty-day Period for Consideration and Evaluation of Public Comments.**

After holding the public hearing required in WAC 468-600-741, the Commission must consider any testimony received, and must wait at least 20 calendar days before taking any action approving, rejecting or directing execution or continued negotiations of the agreement.

**468-600-750. Commission Review of Final Agreement**

On completion of the Attorney General's legal sufficiency review of the final agreement, and after considering any public comment received, the Commission shall:

- (1) Approve the final agreement;
- (2) Reject the final agreement; or
- (3) Return the final agreement to the team for further negotiation on issues the

Commission specifies.

**468-600-800. Transportation Innovative Partnership Program Administration.**

**468-600-805. Program Expenses Attributable to Projects.**

The Department shall confer with its internal auditor and accounting staff to adopt a methodology to properly apportion program and project development expenses to the specific projects that are the subject of an agreement executed under WAC 468-600-750. The Department shall forward the methodology for properly allocating program expenses to the Office of Financial Management for review and approval.

**468-600-810. State's Reservation of Rights.**

(1) The State reserves all rights available to it by law in administering these rules, including without limitation, the right in its sole discretion to:

- (a) Reject any and all proposals at any time;
- (b) Terminate evaluation of any and all proposals at any time;
- (c) Suspend, discontinue and/or terminate comprehensive agreement negotiations with any Proposer at any time prior to the actual authorized execution of such agreement by all parties;
- (d) Negotiate with a Proposer without being bound by any provision in its proposal;
- (e) Request or obtain additional information about any proposals;
- (f) Issue addenda to and/or cancel any RFQ or RFP;
- (g) In accordance with the rule-making procedures of chapter 34.05 RCW, supplement or withdraw all or any part of these rules;
- (h) Decline to return any and all fees required to be paid by Proposers hereunder; and
- (i) Request revisions to proposals.

(2) Absent express written provisions contained in any solicitation document, order or written policy issued by the Department, the Department is not liable for, or required to, reimburse the costs incurred by Proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements. Any and all information the Department makes available to Proposers shall be as a convenience to the Proposer and without representation or warranty of any kind.